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NO. 59534-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BETH AND DOUG O'NEILL,

Appellants

v.

THE CITY OF SHORELINE, a Municipal Agency; and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE BRUCE W. HILYER

REPLY OF APPELLANTS TO BRIEF OF CITY OF SHORELINE

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There are many examples of metadata. Such information includes file designation, create and edit dates, authorship, comments, and edit history. Indeed, electronic files may contain hundreds or even thousands of pieces of such information. For instance, email has its own metadata elements that include, among about 1,200 or more properties, such information as the dates that mail was sent, received, replied to or forwarded, blind carbon copy ("bcc") information, and sender address book information. Typical word processing documents not only include prior changes and edits but also hidden codes that determine such features as paragraphing, font, and line spacing. The ability to recall inadvertently deleted information is another familiar function, as is tracking of creation and modification dates.

The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery, (The Sedona Conference Working Group Series, July 2005 Version), page 3.

I. The City's Core Argument: Public Agencies Should Be Permitted To Permanently Change, Damage Or Destroy The Integrity Of A Public Record After A Request For That Record Is Made.[1]

Reduced to its core, the City argues that government officials ought to be at liberty to change, damage, or fully destroy a public record, including deletion of unique metadata associated with that record, after a request for that record had been made. Under the City's interpretation of the Public Records Act, it should then be allowed to produce an altered or incomplete copy of the original record, despite that the request implicitly called for access to an unaltered and complete record. The City's position is in derogation of the letter and spirit of the law, and an affront to principles of open government.. Appellants ask this Court to closely and carefully analyze the positions of both respondents, and in view of the foreseeably deleterious consequences, reverse the trial court's decision and remand.

[1] Appellants' directly address Respondent Maggie Fimia's arguments starting in section V, below. Note that while Ms. Fimia was defeated in the last election, this brief will nevertheless refer to Ms. Fimia as the Deputy Mayor.

The City's contradictions start at the very beginning of its brief. In the second sentence of its brief the City asserts that it "responded fully to the public records requests submitted by appellants." *Brief of City*, at 1. But in its very next assertion the City admits (in the passive voice albeit) that it *did not* respond fully to the appellants' public records requests, that it actually failed to produce requested metadata associated with the email: "Ultimately, this case is about the O'Neills' inability to obtain the metadata record associated with one email." (*Brief of City*, at 1).[2] Two sentences later, the City confesses its guilt, that it did not preserve the email requested but rather deleted it. The City attempts to defend its destruction of a public record by claiming "[d]eletion of this electronic version of the email was in full compliance with the Secretary of State's General Retention Schedule, which gives blanket authority to cities for the disposition of records." *Id.*

But the City overlooks RCW 42.56.100, which unambiguously states:

> If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency . . . shall retain possession of the record, and may not destroy or erase the record until the request is resolved. (emphasis added)

Even if the City's *post hoc* justification that the general retention schedule permits a public agency to dispose of records in the manner alleged, "in the event of a conflict between the [Public Records] Act and other statutes, the provisions of the Act govern." *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 262, 884 P.2d 592, *reconsideration denied*,

[2] Indeed, if the City had provided the metadata associated with the one email in question, this case might never have seen the light of day.

(1994), citing RCW 42.17.920;[3] *Building Industry Ass'n of Washington v. State Dept. of Labor & Industries*, 123 Wn.App. 656, 663, 98 P.3d 537 (2004).

It is equally well settled that the destruction of a public record is a violation of the PRA. *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 710, 716 (1989). Because the City did not "retain possession of the record" and did "destroy or erase the record [before] the request [was] resolved," the City violated the PRA. *Id.* One violation of the PRA alone should have prevented the trial court from dismissing this case.

The city further urges that "even if the metadata had been available at the time of the request, that metadata would not provide the appellants with any information not already provided." (*Brief of City*, at 1). But the metadata *was* available at the time of the request because Deputy Mayor Fimia had custody of the original email on her computer and she then deleted the requested record after the request was made. Moreover, provision of the metadata *would* provide the appellants with information the City has not yet provided; it would provide the appellants with the unique metadata they explicitly asked for, and under the PRA are entitled to.

Ultimately this case is about Beth and Doug O'Neills' ability to obtain a true and unaltered version of an original public record before a public official or agency removes the to/from headers, alters the subject line, and finally permanently destroys the original record. Thus far the O'Neills have been defeated

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[3] While RCW 42.17.920 originally arose from Initiative Measure No. 276, (approved November 7, 1972), which gave birth to the Public Disclosure Act (RCW 42.17.250 et seq.), this section of the statute was not explicitly carried into the new chapter 42.56 by the Washington Legislature when it recodified "some" of the laws found in chapter 42.17. *See* RCW 42.56.001. Arguably this provision still directly applies, as it refers to the "act" not the "chapter." Certainly the above cited cases still apply.

in their quest, first by the agency beholden to protect and preserve the public record sought, and then by the trial court that abruptly dismissed their case. Under the law as it is evolving in federal and other jurisdictions, metadata associated with a record is a sufficiently integral part of the record that its removal renders the record incomplete. (*See §§III & V, infra*). In this day of paperless offices, email correspondence and electronic law libraries, the question is not whether electronic data should be produced, but in what form the production should take.

II. Reply To City's Counter Statement Of Facts.

The City avers that "this case revolves around the City's response to five public records requests submitted by the O'Neills . . . none of which requested any record in electronic format." (*Brief of City*, at 2). But when Deputy Mayor Fimia publicly stated that she "received [an] email today from a Ms. Hettrick and a Ms. O'Neill that made serious allegations," Beth O'Neill's immediate response was "I will need to see that email. . . . I would like that to be a matter of public record." *Dec. Beth O'Neill*, at 3.[4] *See also* CP 20-22. Granted Beth O'Neill did not *explicitly* request the email "in electronic format with metadata intact," but she did ask to "see that email," not "a print-out of that email," and certainly nothing less than "that complete email."

Before it destroyed metadata associated with the email the City should

[4] At page 4, fn.1 of Appellants' Opening Brief, I referred to the November 21, 2006, Declaration of Beth O'Neill directly, and stated that I would provide updated references, if available, in a corrected brief. Apparently the Superior Court transmitted the declaration as an exhibit, sans clerk's papers page numbers. On consultation with a clerk of this Court, I learned that the Superior Court's transmission was unusual, and that the parties could refer to the Declaration as "Sub #4, Declaration of Beth O'Neill." For economy's sake I will refer to Beth's declaration as "Dec. of Beth O'Neill."

have asked the O'Neills if they wanted the metadata associated with the email. Under RCW 42.56.100, where the City is required "to provide full public access to public records, to protect public records from damage or disorganization [and to] provide for the fullest assistance to inquirers," this would have been a logical thing to do. But this the City did not do. The City instead second-guessed Beth O'Neill's underlying purpose in requesting the email when it assumed that a print-out of the text of the email would resolve her record request. The City essentially skirted the thrust of RCW 42.56.080, which prevents agencies from requiring any citizen "to provide information as to the purpose for [her] request," and decided that Beth O'Neill's purpose would be fulfilled with a print-out of the email, absent critical embedded information. Any assumption by the City that the public record request was for anything less than the full data content of the email was unsupportable in the law, and in this instance led to a violation of the law.

The mere fact that upon clarification of her request Ms. O'Neill specifically asked for all metadata associated with the email (*Dec. Beth O'Neill*, Exhibit G), suggests Beth O'Neill did indeed seek access to the complete record at the outset, not a redacted, partial or incomplete record. Based on emerging standards in the law, when a citizen requests an electronic record, the producing agency should at least preserve the electronic record in its native format with metadata intact until a court can rule on any claimed exemptions. *See e.g. Williams v. Sprint/United Management Co.,* 230 F.R.D. 640, 644-56, (D. Kan. 2005), *infra* at 8; FRCP 34(b)(ii).

Yet instead of preserving or producing the entire email, "the Deputy

Mayor removed . . . forwarding information" from the email, and then transmitted the incomplete electronic record to city officials for delivery to Beth O'Neill. *Brief of City,* at 5. *See also* CP 21. As Deputy Mayor Fimia explained: "In forwarding the email, I removed the 'to' and 'from' line listing Lisa Thwing as the sender and recipient in order to protect Ms. Thwing from potential public exposure." CP 21. It is well established in Washington that where information contained in a record does not cause an unreasonable invasion of personal privacy, disclosure of such information is required. *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn.App. 129, 737 P.2d 1302, *review denied* (1987). Ms. Fimia then "inadvertently" deleted the email. CP 22.

The City is at pains to establish that because Ms. O'Neill never formally asked for metadata associated with the subject email until her third request, the City was at liberty to destroy the original requested record after her first request, including unique information contained in that electronic record, *e.g. City's Brief* at 1, 6, 16-17, 19-20, 21, 22. At page 19 of its brief the City claims that "[o]n September 25, 2006, Ms. O'Neill . . . requested metadata for the first time." And on page 22 the City argues that "[n]ever once did Ms. O'Neill request the document in electronic form," that it "received Ms. O'Neill's request for the metadata *after* the email had been printed out, retained and deleted in compliance with the retention schedule, not before." *Id.* (emphasis in original).

But in the context of the liberally construed PRA, which imposes substantial and meaningful burdens on public agencies "to protect public

records from damage or disorganization [and to] provide for the fullest assistance to inquirers" the City's claim that "if Ms. O'Neill had made a timely request for metadata, the City could have produced it," is tantamount to blaming the victim. *Brief of City,* at 20; RCW 42.56.100. By analogy, if a citizen requests access to a letter received by an agency and the agency responds with a photocopy of the letter but obscures the letterhead and does not send the attachments or the originating envelope, all of which were part and parcel of the letter, the citizen would be forced to make a second public records request for the entirety of the data he or she requested initially. The agency is not in compliance with the Act because it did not provide the requestor full access to the requested record(s).

If finally the agency's withholding drives the citizen to explicitly request a full copy of the letter, including the letterhead, the attachments, and any envelope, routing or other information associated with the letter, and the agency then replies that it has since shredded the envelope and all routing information "in conformance with its records retention policy," has the agency violated the PRA? Under the PRA, which is to be liberally construed to promote full access to public records so as to assure continuing confidence in government, the answer to this question is "yes." RCW 42.17.010(2), (5), (11); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); RCW 42.56.100. The City and its deputy mayor both broke the law.

The PRA places the responsibility for preserving the integrity of public records with public agencies, not citizens seeking access to those records, because the agency is in the best position to preserve and protect, or

alternatively, to destroy or obfuscate data. The City's attempt here to place the burden and blame on Ms. O'Neill for not being more specific in her original request is not viable where Ms. O'Neill said to the Deputy Mayor "I will need to see that email." *Dec. Beth O'Neill*, at 3. Under RCW 42.56.520 the City could have asked Ms. O'Neill to clarify her request, and the city could simply have asked Ms. O'Neill if she wanted metadata associated with the original email too. As mentioned above, under RCW 42.56.100 the City was required to preserve the complete record until the request was resolved internally or by the court, and to provide "the fullest assistance to inquirers." This the City did not do.

III. Metadata Is An Inherent Part Of Email, Fundamental And Meaningful To The Electronic Record.

In addition to arguing that its actions should be excused because Ms. O'Neill never formally requested metadata associated with the subject email, the City strenuously urges the court to accept its proposition that the metadata associated with the email is not part and parcel of the email, that it is rather "information" about the email (*City Brief*, at 20, *et seq.*) or even a separate record to be requested independently or explicitly. But as the Court held in *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 648-52, (D. Kan. 2005), a matter which involved a discovery dispute analogous to the situation here: "when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their meta data intact . . . ." The Court reasoned that the producing party:

> already has access to the meta data and is in the best position to

> determine whether producing it is objectionable. Placing the burden on the producing party is further supported by the fact that meta data is an inherent part of an electronic document, and its removal ordinarily requires an affirmative act by the producing party that alters the electronic document.

Id., *emphasis added.* Thus the City's implicit proposition, that Beth O'Neill requested the metadata too late, opens the door for public agencies across the state to make an end run around the PRA, particularly the mandate of RCW 42.56.100, which requires protection and preservation of records and the fullest possible assistance to requestors.

In *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), the court was asked to resolve the question whether printing hard-copy paper versions of electronic records sufficiently preserved federal electronic records material consistent with the Federal Records Act. The court held that

> the mere existence of the paper printouts does not affect the record status of the electronic materials unless the paper versions include all significant material contained in the electronic records. Otherwise, the two documents cannot accurately be termed "copies"--identical twins--but are, at most, "kissing cousins." Since the record shows that the two versions of the documents may frequently be only cousins--perhaps distant ones at that--the electronic documents retain their status as federal records after the creation of the paper print-outs, and all of the FRA obligations concerning the management and preservation of records still apply.

Id., at 1283. Significantly the appellate court variously referred to e-mail hard copy printouts as "dismembered," "amputated," or "lopp[ed] off," where these print outs were missing transmission and receipt information, which in its view was "integral," "fundamental, and "meaningful," to the preservation of a

complete electronic record under the Federal Records Act:

> Our refusal to agree with the government that electronic records are merely "extra copies" of the paper versions amounts to far more than judicial nitpicking. Without the missing information, the paper print-outs--akin to traditional memoranda with the "to" and "from" cut off and even the "received" stamp pruned away--are dismembered documents indeed.
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> * * * *
>
> In our view, as well as the district judge's, the practice of retaining only the amputated paper print-outs is flatly inconsistent with Congress' evident concern with preserving a complete record of government activity for historical and other uses.

Id., at 1285.

This emerging trend is perhaps most conspicuous in cases decided during the past few years in which courts around the nation have ordered production of metadata in the discovery context.[5] Many such decisions recognize the value of metadata in establishing and ensuring document integrity and reliability.[6] These decisions in this electronic age point the correct path for this court to follow in resolving the issue at bar.

IV. The City Did Not Need To Be A "Mind Reader" To Comprehend Beth O'Neill's Request.

The City also tries to get around the requirement of producing or preserving metadata associated with an electronic record by arguing that Ms. O'Neill's second request for " 'all information relating to this email' is not an

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[5] *See e.g. In re NYSE Specialists Sec. Litig.*, No. 03 Civ. 8264(RWS), 2006 WL 1704447, at 1 (S.D.N.Y. June 14, 2006); *In re Priceline.com Inc. Sec. Litig.*, 233 F.R.D. 88, 91 (D. Conn. 2005).

[6] *See e.g. Rodriguez v. City of Fresno*, No. 1:05cv1017 OWW DLB, 2006 WL 903675, at 3 (E.D. Cal. Apr. 7, 2006); *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04 C 3109, 2006 WL 665005, at 2 (N.D. Ill. Mar. 8, 2006).

appropriate request for records." *Brief of City,* at 20-21. The City argues that the Act does not require agencies to research or explain public records, nor does it "require public agencies to be mind readers." *Id.*, quoting *Bonamy v. City of Seattle*, 92 Wn.App. 403, 450-51, 960 P.2d 447 (1998). But Beth O'Neill did not ask for an explanation, she asked for a public record.

The City understands that metadata is "data about data" (CP 41, fn.1) so it must also understand that "data" is nothing more than information, and in this case, recorded information. Black's Law Dictionary, 6th Ed. defines data as information, to wit:

> Organized information generally used as the basis for an adjudication or decision. Commonly, organized information, collected for a specific purpose.

In other words, Beth O'Neill's request for "all information relating to this email" was a request for "all data relating to this email." The City should have understood from the outset that Beth O'Neill wanted (or might have wanted) the *meta*data too, even if she did not initially recite the technical term "metadata" explicitly. Where the statute requires agencies to provide the fullest assistance to requestors, an agency cannot require citizens to recite magic words to ensure full compliance with the Act. RCW 42.56.100.

The City's argument that it should not be required to be a "mind reader" is inapposite and opens up dangerous ground. Under the City's analysis if an individual does not explicitly ask for every shred of information or data conceivably associated with a given record, particularly an electronic record – *and* use the correct terminology – the public agency, not being a "mind reader," would be at liberty to destroy critical facets of the complete record, provided

their destruction of records comports with some general retention policy. Again, this is contrary to the PRA, as the facts of this case establish.

It was plain from the outset of her request that Beth O'Neill wanted the entire email, which necessarily included every vestige of data associated with or contained within the email. A brief survey of Ms. O'Neill's first few requests for access to the email, including some of Ms. Fimia's and the City's actions, is instructive:

- September 18, 2006, evening. Beth O'Neill to Maggie Fimia (orally): "I will need to see that email . . . I would like that to be a matter of public record." *Dec. Beth O'Neill*, at 3.
- September 18, 2006, 10:29 p.m. Maggie Fimia: "I removed the 'to' and 'from' lines listing Lisa Thwing as the sender and recipient in order to protect Ms. Thwing from potential public exposure. . . ." CP 21.
- September 19, 2006. Beth O'Neill to Carolyn Wurdeman (telephonically): "[I want] the entire email string." *Dec. Beth O'Neill*, at 4.
- September 19, 2006, 1.27 p.m. Carolyn Wurdeman to Maggie Fimia (by email): Ms. O'Neill [is] requesting information about who the email was to. Do you have that information for Ms. O'Neill? *Dec. Beth O'Neill*, Exhibit C.
- September 19, 2006, 9.07 p.m. Maggie Fimia to Carolyn Wurdeman (by email): "There was no 'To' line in the e-mail." *Id.*
- September 20, 2006. Beth O'Neill to City, (in person on the City's public records request form): "[I am seeking access to the] e-mail mentioned by Deputy Mayor Fimia at the 9-18 Council meeting." *Dec. Beth O'Neill*, Exhibit D.
- September 20, 2006. City to Beth O'Neill, (provided over the counter): print out of an "email [which] does not show the 'to' field or the email where the subject heading was changed or how it reached Ms. Fimia or Ms. Wurdeman." *Dec. Beth O'Neill*, at 5; *Id.*, Exhibit E.
- September 20, 2006. Beth O'Neill to City, (in person on City's

public records request form immediately upon receipt of the aforementioned photocopy): "[I am seeking access to] all information relating to this email: how it was received by Maggie Fimia, from whom it was received, and the forwarding chain of the email. As it stands now, the email which was provided to us today (9/20/06) from Maggie Fimia through the City Manager's office is not sufficient, It [sic] is simply a piece of paper which could have been put together by anyone and called an email. Further documentation is required in order to validate this document." *Dec. Beth O'Neill*, at 6. *Id.*, Exhibit F.

- September 25, 2006. Beth O'Neill to City, (on the City's public records request form): "[I am seeking access to the] email transmission attributed to Ms. Hettrick and Ms. O'Neill in a statement made by Deputy Mayor Fimia at the City Council meeting on 9/18/06." Ms. O'Neill further wrote that she wanted "Any and all correspondence (including memos) relating to this email. Complete transmission/forwarding chain AND ALL metadata pertaining to this document." *Dec. Beth O'Neill*, at 6; *Id.*, Exhibit G.

As the Court can see from the foregoing, not only did Ms. Fimia unlawfully redact information from the email after Ms. O'Neill made her request, if it wasn't plain by Ms. O'Neill's first request that she wanted the entire email (not part of the email – "I will need to see that email"), it was absolutely plain by her second request made over the phone that Ms. O'Neill was seeking access to the email in its entirety. The City did not need to be a "mind reader" to preserve the integrity of the entire email string, including metadata associated with the email; all the City needed to do was know the law and follow it.

Bureaucratic ineptitude is no excuse for wrongdoing. As this court of appeals held in *Yousoufian v. Sims*, 114 Wn.App. 836, 853, 60 P.3d 667 (2003), when confronted with similar "bureaucratic ineptitude:"

In the final analysis, it seems clear that the County's violation of

> the PDA was due to poor training, failed communication, and bureaucratic ineptitude. . . .

Whatever the cause here, the City violated the Act when it destroyed the email after a request was made, and it should be held accountable, bureaucratic ineptitude notwithstanding. In light of the evidence presented, and inferences drawn from that evidence, the trial court erred when it ruled that the "plaintiffs cannot overcome the City's show of proof that it has fully and completely responded in a lawful and appropriate manner." CP 141. Accordingly this Court should reverse.

V. The Email In Question Including The Electronic Version And Associated Metadata, Is A Public Record And Subject To Disclosure Pursuant To The Public Records Act.

The email in question, including the electronic version and associated metadata, is subject to disclosure under the PRA. RCW 40.14.010 defines a public record as: "any paper, correspondence, completed form . . . machine-readable material . . . or other document, **regardless of physical form or characteristics**, and including such copies thereof, that have been made by or received by any agency of the state of Washington in connection with the transaction of public business, and legislative records." (emphasis added).

Under Washington law, the three-prong test used to determine whether a record constitutes a public record and is therefore subject to public disclosure is: "(1) any writing[,] (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function[,] (3) prepared, owned, used, or retained by any state or local agency **regardless of physical form or characteristics**." *Tiberino v. Spokane County*, 103 Wn.

App. 680, 687, 13 P.3d 1104, 1108 (2000) (citing *Confederated Tribes v. Johnson*, 135 Wn. 2d 734, 746, 958 P.2d 260 (1998), quoting RCW 42.17.020(36) (emphasis added). In her brief, Respondent Fima neglects to include the entire relevant language from *Tiberino* when laying out the statutory test used to determine whether a record is a pubic record subject to disclosure. *See Brief of Fimia at* 5 (citing *Tiberino*, 103 Wn. App. at 687). The true and accurate language clearly identifies that: "regardless of physical form or characteristics" the record is still subject to disclosure under the PRA. *See Tiberino* at 687. The PRA makes no distinction between an electronic copy and a paper copy of a record in dispute.

The complete version of the email at issue satisfies the three-prong test set forth in RCW 42.17.020(41). First, the email was a writing; the "physical form" of the record is of no consequence. The first prong of the test is met because both the printed email and the electronic form with associated metadata qualify as "a writing." Second, in examining whether the record "contain[s] information relating to the conduct of government or the performance of any governmental or proprietary function," it is well recognized that courts "broadly interpret . . . this second element of the statutory definition of public record." *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn. 2d 734, 746, 958 P.2d 260, 265 (1998). *See also Servais v. Port of Bellingham*, 127 Wn. 2d 820, 828, 904 P.2d 1124, 1128 (1995) (research data compiled by consultant for purposes of planning by Port of Bellingham was a public record because it related to a governmental function); *Oliver v. Harborview Medical Center*, 94 Wn. 2d 559, 566, 618 P.2d 76, 81 (1980) (patient's public hospital medical

records subject to public disclosure because they "relate[d] to a the performance of a governmental or proprietary function.").

Additionally, the PRA is a "strongly worded mandate for broad disclosure of public records." *Amren v. City of Kalama*, 131 Wn. 2d 25, 31, 929 P.2d 389, 392 (1997). "Any written information about the conduct of government is a public record, 'regardless of physical form or characteristics.'" *Daines v. Spokane County*, 111 Wn. App. 342, 347, 44 P.3d 909, 912 (2002) (*citing* RCW 42.17.020(36); *Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000)). The email in question does relate to the conduct of the government, and because of the broad interpretation of the second prong in defining what relates to the conduct of government, the email is subject to public disclosure pursuant to the PRA.

Respondent Fimia suggests that the proper analysis centers on an examination of "the role the document plays in the system." *Brief of Fimia at* 5 (citing *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 711-12, 780 P.2d 272 (1989)). However, an accurate reading of *Yacobellis* demonstrates that the approach mentioned in *Yacobellis* is merely dicta from *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981). *See Yacobellis*, 55 Wn. App. at 711-712 ("In dicta, however, the court stated that the issue of access to records should be determined by the role the documents play in the system, not who handles them.") In *Yacobellis*, the court held that: "the questionnaires [at issue], which were prepared by a governmental agency and responded to by other governmental agencies, were the final evidence of the knowledge obtained even though they were not the formal product which the Parks

Department intended to release to the public." *Id.* at 714, 780 P.2d at 277 (finding such questionnaires subject to disclosure under the PRA).

Third, respecting whether the writing was "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics," Respondent Fimia concedes that at a minimum, the printed out version of the email "may have become a public record." *Brief of Fimia at* 6; *see also* RCW 42.17.020(41) (recodified as 42.56.010). The statute does not distinguish between an electronic form of a record and a printed out version, nor does respondent cite to any authority to support such a distinction. The electronic and paper copies of the email, with associated metadata intact, are indistinguishable and subject to disclosure within the meaning of the PRA.

Regardless of whether the email at its inception was a public record, Respondent Fimia's use of the email at a public city council meeting unquestionably alterd the purported status of the email making it a public record. Assuming *arguendo* that the original email received by Ms. Fimia was a private communication sent to her personal computer, it became a public document when she used the information possessed in the email to pose a question regarding certain code enforcement decisions made by Shoreline city council members. (Appellant's Br. 4) Respondent Fimia's use of the document to question the conduct of the government, cast it into the public domain. Destruction of the original electronic version and associated metadata of the email was a violation of the PRA.

VI. Appellants' Public Records Request Does Not Infringe On Respondent Fimia's First Amendment Right Of Association Because Any Claim To Privacy Was Waived When Respondent Voluntarily Placed The Document Into The Public Forum.

In her brief to this Court, Respondent Fimia argues: "If the Public Records Act required Deputy Mayor Fimia to disclose [the email in question]," it would "infringe on her First Amendment right" to association pursuant to the three-part test applied in a Division 2 case, *Right-Price Recreation, LLC v. Connells Prarie Community Council*, 105 Wn. App. 813, 822, 21 P.3d 1157 (2001)). *Brief of Fimia at* 7. But *Right-Price* involved discretionary review of a discovery order arising in private party litigation—not a public records request implicating the conduct of government and the welfare of the citizenry, thus the 3-part test applied in *Right-Price* is inapplicable to the issues at hand. *See Right-Price,* 105 Wn.App. at 816.

The right of privacy exception to the Public Records Act is codified in RCW 42.56.050.[7] "The right of privacy protected by this exemption is equivalent to that protected by the common law of torts." *Columbia Publ'g Co. v. City of Vancover*, 36 Wn. App. 25, 29, 671 P.2d 280, 283 (1983) (*citing Hearst Corp. v. Hoppe*, 90 Wn. 2d 123, 135-37, 580 P.2d 246, 253-54 (1978)). "Material is exempt from disclosure when it is so personal in nature that disclosure would be highly offensive to a reasonable person, and of no legitimate concern to the public." *Id.* (citing *Hearst Corp. v. Hoppe, supra*; *Laborers Int'l Union of North America, Local 374 v. Aberdeen*, 31 Wn. App.

[7] *See also* RCW 42.56.290: Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

445, 642 P.2d 418 (1982) (in the discovery context even personal material may be discoverable, or material not so personal might not be discoverable, depending on the facts and context of the case.)

The appropriate test to apply in a public records context is further set forth in *John Does v. Bellevue School Dist.*, where this court ruled: "The right to privacy is invaded or violated under the [Public Records] Act 'only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." 129 Wn. App. 832, 840, 120 P.3d 616, 620 (2005). The court further noted, "Disclosure is 'highly offensive to a reasonable person' if it is the type of information the employee would normally not share with strangers." *Id.* at 845.

Here, Respondent Fimia fails both parts of this test. First, the public document, (the email), was shared with strangers and with the general public when Ms. Fimia voluntarily referred to and discussed the email at the city council meeting on September 18, 2006. *Appellants Br.*, 4. Second, Respondent Fimia clearly felt this document *was* of legitimate concern to the public since she made the decision to make a public statement about the document in a public forum at a City Council meeting and use it to pose a question regarding the job performance of city council members. *Id.* For these reasons, Respondent Fimia's right to privacy was not invaded or violated.

Additionally Respondent Fimia waived any claim of privacy when she voluntarily brought the document to the public's attention. This factual scenario is similar to that presented in *Columbia Publishing Company v. City of Vancouver*, 36 Wn.App. 25, 27, 671 P.2d 280, 282 (1983). In *Columbia,* the

Vancouver Police Association (VPA) issued a press release expressing a number of concerns about the Vancouver Police Chief. *Id.* This press release was based on thirteen written statements made by individual officers. *Id.* A newspaper requested the statements made by the officers, and the Court ruled that the documents were public records available for disclosure pursuant to the Public Records Act. *Id.* at 30, 671 P.2d 280, 284. "Moreover, the VPA has waived any claim of privacy by its individual members by choosing to 'go public' with its complaints as it did. One cannot go to the press with vague complaints about a public official's job performance and then hide behind a claim of personal privacy when disclosure of specifics is requested." *Id.*

Here, Respondent Fimia used the document in a public forum to question the job performance of city council members. She invited public comment and inquiry. She cannot now claim a right to privacy. For these reasons, Respondent Fimia's First Amendment right to association and any related claims of privacy were not violated as a result of this records request.

VII. The Trial Court's Sua Sponte Decision Deprived The O'Neill's Of A Meaningful Opportunity To Be Heard.

This matter began with the filing of a summons, complaint and motion for an order requiring the defendants to show cause why the City should not be held accountable for its admitted destruction of a public record. CP 1-9, CP 10-11; CP 12-16. The City responded to the motion with, among other things, its own motion to dismiss. While technically the trial court should not have entertained the City's "motion," made in the context of a response brief and without noting the matter to be heard in accord with local rules, the trial court nevertheless held that "all responsive records that exist have been provided to

the plaintiffs" and "the defendants have established that no additional responsive records are available or contained on the computer hard drive of defendant Fimia and duplication of the hard drive for further in camera inspection is not warranted." CP 141. The court then dismissed the case.

But if, for example, the City had brought its facts to bear in the context of a motion for summary judgment under CR 56, or a motion to dismiss under CR 12(b)(6), the responding plaintiffs could have had 17 to 19 days to obtain expert testimony to rebut the City's in-house computer person, and to prepare a more thorough response. Instead, under King County Local Rule (KCLR) 7(b)(3)(C) and (D), the plaintiffs had, at most, only 24 hours to respond to the City's factual and legal challenges. *City's Brief*, at 26; CP 307. While the City argues that the plaintiffs "should have provided expert affidavits testifying to their points," a mere 24 hours was insufficient time to properly respond. *Id.*

As this Court well knows, the moving party in a summary judgment proceeding bears the burden of establishing that no genuine issue of material fact exists. *See e.g. Cox v. Malcolm*, 60 Wn.App. 894 (1991). All facts submitted and inferences drawn are construed in a light most favorable to the responding party and against the moving party, *e.g. Husfloen v. MTA Const., Inc.*, 58 Wn.App. 686 (1990). Here are the relevant undisputed facts:

- Beth O'Neill requested access to an email in the custody of Deputy Mayor Maggie Fimia. CP 5.
- The City admitted that its Deputy Mayor possessed the electronic record at the time of the request. CP 43.
- The City admitted that its Deputy Mayor removed the "to" and "from" information from the record after the request. *Id.*
- The City admitted that the Deputy Mayor deleted the data to

hide information from the O'Neills and the public. *Id.*

- The City admitted that its Deputy Mayor then deleted the original email, which contained unique responsive data, metadata and other information, thereby destroying a public record.
- The City admitted that it could not produce the original public record that it had custody of when Beth O'Neill made her request. *Id.*

In the context of a motion for summary judgment (hypothetically brought by the City), the court would not need to draw all facts and inferences in favor of the plaintiffs in order to deny the motion, because the City admitted its wrongdoing. Consequently, the court would (or should) deny the motion and the matter would then move ahead.

VIII. The Trial Court Abused Its Discretion When It Dismissed The O'Neills' Case.

The O'Neills contend that the trial court abused its discretion when it dismissed, *sua sponte*, their PRA case. The City argues in return that the trial court had the discretion to dismiss the case on the basis of the law and the evidence before it, *e.g. Brief of City*, at 1, 11, and thus no abuse of discretion occurred. In analyzing whether a trial court abused its discretion, our Supreme Court in *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) established a two-part test. The second prong of the *Junker* analysis provides the logical starting point for an abuse-of-discretion review:

> Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

In re Schuoler, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986), *quoting Junker*, at 26.

Under *Junker*, this court must identify and weigh those interests relevant to the Public Disclosure Act and determine the "reasonableness" of the trial court's decision in light of (1) the compelling interests of those affected by the decision and (2) the "comparative weight of the reasons for and against the decision one way or the other." *In re Schuoler, supra,* at 512. The "compelling public [and] private interests" affected by the trial court's decision include the right of every citizen in this state to access their public records. *See, e.g., Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994). The PRA was originally enacted to secure these very interests, and in order to encourage greater citizen participation in government, subsequent legislative amendments have strengthened the various requirements, including the punitive provisions of the Act. If anything will chill ordinary citizens from seeking judicial review when their legitimate requests for public records are denied or delayed, it will be to affirm the decision of the trial court.

As to the "comparative weight of the reasons for and against" the trial court's decision (*Junker, supra*), the reasons against the decision are many and the reasons for the decision are few. If this court affirms, agencies may be encouraged to obfuscate and ultimately deny citizens access to the full allotment of data associated with electronic and other types of records. Under the trial court's analysis, no penalties will be imposed for the deliberate destruction of a public record after a citizen requested such, notwithstanding

RCW 42.56.100. And private citizens will be deterred from seeking prohibitively costly legal representation and redress in the courts.

This is not what the legislature intended. If this court condones the City's redaction of data absent a claim of exemption under RCW 42.56.210 (3), and its ultimate destruction of a public record after a request for the record was made, the door will be wide open to further such fundamentally undemocratic acts across the state.

IX. The City's Position On Fee Shifting Confirms That This Court Should Resolve The Question.

The O'Neills argued in their opening brief that the trial court committed reversible error when it ordered them to pay the agency's costs. In return, the City states that it "recognizes that there may be a question of whether costs may be granted to an agency," and it "has no objection to the Court striking this portion of the order since it is consistent with the City's position in the trial court proceeding." *City's Brief* at 27. Curiously the City then argues that an agency should be entitled to an award of attorney fees, and presumably costs: "[i]f the case is remanded, attorney fees should abide the results of that remand." *Id.*

But there is no basis in the law for an agency to receive fees or costs. RCW 42.56.550(4), is a one-way fee shifting provision, which allows an award of costs and fees to "[a]ny person who prevails against an agency," not to "any agency who prevails against a person." The Legislature did see fit to include a bilateral fee shifting provision in the Open Public Meetings Act, under RCW 42.30.120(2), but no such language exists in the PRA. Because this is an issue which both the appellants and the City contend can arise again, this court

should issue a decision resolving the question.

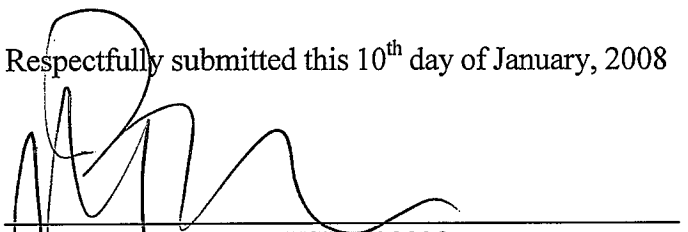
X. Conclusion.

The City's admitted actions can hardly be said to comport with acceptable records keeping procedures, or legitimate actions and responses under the PRA. At minimum the City violated RCW 42.56.100:

> If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency . . . shall retain possession of the record, and may not destroy or erase the record until the request is resolved. (emphasis added)

The word "shall" in the statute is a word of command, not license to ignore the clear mandate of this provision of the Act. The City nevertheless ignored the clear mandate of the Act when it failed to retain possession of the requested record and instead destroyed or erased the record before the request was resolved. Where the City admittedly destroyed a public record and then failed to facilitate access to the full record, the appellants are entitled to statutory penalties and attorney fees under RCW 42.56.550(4). Accordingly this Court should reverse.

Respectfully submitted this 10th day of January, 2008



Michael G. Brannan, WSBA 28838
Of Attorneys for the O'Neills

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

BETH AND DOUG O'NEILL, individuals,	)	
	)	No. 59534-2-I
Appellants,	)	
	)	DECLARATION OF
v.	)	SERVICE
	)	
THE CITY OF SHORELINE a Municipal Agency and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,	)	
Respondents.	)	

I, David Meide, declare as follows:

1) I am over 18 years of age and a U.S. citizen.

2) On January 10, 2008, I caused to be delivered true and accurate copies of the following documents to the following parties as indicated below:

ORIGINAL

a. Appellant's Reply Brief, and;

b. This Declaration of Service.

Service List

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of January, 2008, at Seattle Washington.

David Meide